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No. 09-309

Supreme Court, U.S.
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In the Supreme Court of the United States

tw telecom of oregon, llc

Petitioner,

v.

CITY OF PORTLAND

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* QWEST CORPORATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Amicus Curiae will address two questions:

1. Federal Court Jurisdiction over Federal Telecommunications Act Claims: The question presented is whether state and local right-of-way assessments imposed on telecommunications companies are indeed "fees" (as opposed to taxes) and therefore subject to federal jurisdiction, as every Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

2. Federal Preemption Under Section 253(a) of the Telecommunications Act: The question presented is whether section 253(a) prohibits state and local legal requirements that materially inhibit or limit a telecommunications provider's ability to compete in a fair and balanced legal and regulatory environment, as the FCC and every other Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

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INTEREST OF THE AMICUS CURIAE[1]

Qwest Corporation was a co-plaintiff with tw telecom of oregon, llc ("TWT") in the District Court proceedings and a co-appellant with TWT before the Ninth Circuit. This Court's ruling will directly affect Qwest's ability to provide service to its customers in the City of Portland, in the State of Oregon, and throughout the nation.

Qwest provides local and long-distance wire-line services, broadband, and WiFi telecommunications service throughout the United States. Qwest's provision of these services to cities and their residents is consistent with the direction of the federal Telecommunications Act and the FCC's recent Broadband Initiative. But these services can only be provided if Qwest has fair and consistent access to the public rights-of-way in the cities in which it operates. A telecommunications network—poles, wires, fiber-optic conduits, equipment cabinets, and power sources—depends upon the ability to occupy the rights-of-way.

Qwest thus has a substantial interest in ensuring that federal courts exercise jurisdiction to hear cases involving right-of-way fees under section 253 of the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Telecom Act"), and in ensuring that the Telecom Act continues to serve its key purpose: limiting local regulations that restrict and inhibit competition, thereby providing affordable access to telecommunications

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curie*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

nationwide and fostering advancements in telecommunications that benefit all Americans.

By virtue of its long-standing, national network, Qwest has wide-ranging experience with local regulations concerning the public rights-of-way and with the regulations in the City of Portland, Oregon. Consequently, it is uniquely situated to offer a perspective on how the Ninth Circuit's opinion below limits the use of the public rights-of-way and impedes technological innovation.

SUMMARY OF THE ARGUMENT

The Ninth Circuit held that federal courts do not have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. Equally troubling, the court held that telecommunications companies are entitled to protections of section 253(a) of the Telecom Act only if a local regulation "ha[s] the effect of prohibiting the provision of telecommunications services" by preventing the provider's "continued operation." On both issues, the Ninth Circuit's opinion has created a circuit split that warrants this Court's review.

On the jurisdiction issue, the Ninth Circuit held that percentage-of-revenue-based right-of-way fees are "taxes" for purposes of the Tax Injunction Act and, as a result, denied federal courts of jurisdiction to hear challenges to such fees under the Telecom Act. This is contrary to the Fifth Circuit, which has ruled that gross-revenue-based franchise fees are not taxes but the price paid to rent use of public rights-of-way, and contrary to the First, Second, Sixth, Tenth, and Eleventh Circuits, which have exercised jurisdiction to hear challenges to local right-of-way fees.

On the section 253(a) issue, the Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted only if it prevents a provider's "continued operation."

Neither the FCC nor any other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act.

Review is also necessary for two other key reasons. First, the Ninth Circuit's ruling permits state and local governments to adopt any fee regulations whatsoever, as long as they denominate the fees as taxes. This will discourage and delay the development of telecommunications services and is contrary to the pro-competitive, deregulatory purposes of the Telecom Act. Second, without review, telecommunications companies will continue to be harmed by the Ninth Circuit's literal prohibition standard. This is exactly what the record in this case showed: both Qwest and TWT lost revenue, customers, and market share in Portland as a result of Portland's unlawful and oppressive regulatory scheme. Qwest respectfully requests that this Court grant review to prevent such harm.

ARGUMENT

I. The Ninth Circuit's Application of the Tax Injunction Act Has Created a Circuit Split and Denied Federal Courts of Jurisdiction to Rule on the Lawfulness of Local Right-of-Way Fees.

As petitioner points out, to provide services in Portland, private telecommunications carriers must enter into a franchise with the City. The franchise requires the payment of a recurring annual fee in exchange for use of the City's streets. Such fees vary broadly between carriers, with, for example, some carriers paying percentage-of-revenue-based fees and others paying per-linear-foot charges.[2] The

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[2] The below record cites are included in Qwest's Addendum and Excerpts of Record filed with the Ninth Circuit in *Time Warner Telecom of Oregon, LLC, et al. v. City of Portland*, Nos. 06-36023, 06-

fees are specifically designated by Portland as fees for use of the rights-of-way.[3]

A. A Circuit Split Exists over Whether State and Local Right-of-Way Assessments Are Fees or Taxes.

The Ninth Circuit held that Portland's right-of-way fees are "taxes" for purposes of the Tax Injunction Act.[4] As a result, courts in the Ninth Circuit do not have jurisdiction to hear challenges to such local right-of-way fees under the Telecom Act. The Ninth Circuit stands alone nationally, and its ruling has created a split among the circuits.

Shortly after passage of the Telecom Act in 1996, the Fifth Circuit, when examining a 5% gross-revenue-based franchise fee, held that "[f]ranchise fees are not a tax . . . but essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). Following the Fifth Circuit, numerous other circuits have exercised jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006) (exercising jurisdiction and ruling that gross-revenue-based right-of-way fee violated section 253 because it would "negatively affect" the challenging entity's profitability by imposing a "substantial increase in costs"); *TCG New York, Inc. v. City*

36024, 06-36061 (9th Cir. 2009) (hereinafter referred to as Qwest's Addendum, "ADD" and Excerpts of Record, "QER") and attached as Appendices hereto. *See* 1 ADD, QCC Franchise § 3.1(A), Appendix at 1a; 2 ADD, TWT Franchise § 3.1(A), Appendix at 1a; 3 ADD, IRNE Franchise § 3(A)(1)(b), Appendix at 2a; 8 ADD, QC Temporary Revocable Permit § c.1, Appendix at 2a.

[3] *See id.*

[4] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 3.

of White Plains, 305 F.3d 67, 79 (2d Cir. 2002) (exercising jurisdiction and finding unlawful under section 253 gross-revenue-based right-of-way fee that was applied discriminatorily); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) (exercising jurisdiction and finding a 4% gross-revenue-based right-of-way fee lawful); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-72 (10th Cir. 2004) (exercising jurisdiction and determining that substantial increases in right-of-way fees are unlawful under section 253 where they do not meet the stringent test under section 253(c)); *Bell South Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1180, 1186-92 (11th Cir. 2001) (exercising jurisdiction when considering gross-revenue fee under both state and federal law, and remanding case to district court for further consideration under section 253).

Even the Ninth Circuit, in a prior opinion, affirmed a district court order finding that fees "for use of the public right-of-way . . . essentially are rent for use of city-owned property [and] do not amount to taxes under the TIA." *Qwest Commc'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092 (N.D. Ca. 2001) (internal quotation marks and citations omitted), *aff'd*, 433 F.3d 1253 (9th Cir. 2006).

In short, every circuit, except the Ninth Circuit in its current opinion, has concluded that federal courts have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. The Ninth Circuit's conclusion to the contrary has denied telecommunications companies operating on the west coast access to federal courts and the protections of the Telecom Act.

B. Without Supreme Court Review, Federal Courts in the Ninth Circuit Will Be Unable to Enforce the Telecom Act as to Fee Challenges.

For 13 years federal courts have exercised jurisdiction to determine the lawfulness of right-of-way fees under the Telecom Act. It makes perfect sense that these courts have exercised this jurisdiction. Section 253 limits state and local governments to charging only compensatory fees in exchange for use of their rights-of-way that are fair, reasonable, competitively neutral, and non-discriminatory. *See* 47 U.S.C. § 253(c). These right-of-way fee limitations are a critical component of the Telecom Act. The Telecom Act's pro-competitive purposes are safeguarded by the limitations. *See* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.) (Telecom Act was designed to create a "pro-competitive, deregulatory national policy framework"). Such limitations also prevent prohibitory right-of-way pricing by local governments. The Ninth Circuit now stands alone as the only circuit that will not allow such challenges to be heard in a federal court. This ruling thus has the effect of carving the western region of the United States out of these important protections of federal jurisdiction.

II. By Limiting Section 253 Challenges Only to Laws or Ordinances That Literally Exclude a Carrier from Providing Service, the Ninth Circuit Has Created a Broad Circuit Split That Harms Companies in the Ninth Circuit.

A. A Circuit Split Exists over the Standard for Federal Preemption Under Section 253(a) of the Telecom Act.

In section 253 of the Telecom Act, Congress took regulation of telecommunications competition away from

local government. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The deregulatory, pro-competitive purpose of the Telecom Act, as discussed above, explicitly "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002) (citation omitted).

In accordance with the Telecom Act's purposes, the FCC has stated that section 253 preempts not just those regulations that literally prohibit a carrier from providing a service but also any legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Assoc.*, 12 F.C.C.R. 14,191, 14,206, ¶ 31 (1997). In other words, a prohibition does not need to be complete or insurmountable to run afoul of section 253(a). *See, e.g., TCG New York*, 305 F.3d at 76 (interpreting and applying *California Payphone*). It is sufficient if a legal requirement materially interferes with a carrier's ability to compete. *See, e.g., Santa Fe*, 380 F.3d at 1271 (interpreting and applying *California Payphone*).

In its decision below, the Ninth Circuit expanded the FCC's preemption standard that it had previously adopted in its recent decision, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), and held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted by 47 U.S.C. § 253(a) only if it results in a complete ban on the provision of services. Indeed, the Ninth Circuit expressly stated that "[t]he in-kind requirements that Qwest challenges . . . do not have the effect of prohibiting the provision of telecommunications services, **as demonstrated by Qwest's continued**

operation."[5] Thus, anything short of a complete ban passes muster under the Ninth Circuit's analysis.

The Ninth Circuit previously recognized, in the *Sprint Telephony* decision, that its interpretation of section 253(a) conflicted with the interpretations of several other circuits. *See Sprint Telephony*, 543 F.3d at 577. Specifically, the court stated that the First, Second, and Tenth Circuits adhere to a "broad[er] interpretation of § 253(a)." *Id.* Here, as applied to a complete factual record, that circuit split has grown even wider. No other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act. To the contrary, all other circuits to address the issue have held that such a literal prohibition is not required.

In *Puerto Rico Telephone*, for example, the First Circuit held that the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 450 F.3d at 18 (internal quotation marks and citation omitted) (relying upon *California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The First Circuit added that "a prohibition does not need to be complete or insurmountable to run afoul of § 253(a)." *Id.* (internal quotation marks and citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality. *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability," give rise to "a substantial increase in [the provider's] cost," and "place a significant burden [on the provider]." *Id.* at 18-19.

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[5] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 1 (emphasis added).

Similarly, in *TCG New York*, the Second Circuit held that the test under section 253(a) is whether a regulation "'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" 305 F.3d at 76 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Id.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements and pursuant to which the locality sought to impose a 5% gross-revenue fee on the challenging provider. *Id.* at 71-73, 82. The court concluded that the ordinance was preempted because it would pose "obstacles . . . to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

The Eighth Circuit concluded that the provider "must show an existing material interference with the ability to compete in a fair and balanced market." *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 531-33 (8th Cir. 2007) (*citing California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31), *cert. denied*, 129 S. Ct. 2859 (2009). Importantly, the Eighth Circuit also recognized that a challenging provider "need not show a complete or insurmountable prohibition[,]" as the Ninth Circuit has required. *Id.*

Lastly, in *Santa Fe*, the Tenth Circuit held that the relevant inquiry under section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." 380 F.3d at 1271 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The court, like the First, Second, and Eighth Circuits, also observed that "an absolute bar on the provision of services

is not required." *Id.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. It focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the provision would "den[y] telecommunications providers the 'fair and balanced legal and regulatory environment' the [Telecom Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270-71 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31).

In short, there exists a clear split between the circuits on the applicable standard under section 253(a). This case has only broadened that circuit split, and left the largest circuit denying telecommunications companies the protections of the Telecom Act unless a local regulation will actually result in a company going out of business.

B. Without Supreme Court Review, Companies Operating in the Ninth Circuit Will Continue to Be Harmed.

A direct result of the Ninth Circuit's opinion is that telecommunications companies will lose customers, revenue, and market share. This is exactly what the record—which was fully developed—shows happening in this case. In order to obtain a franchise in Portland, as discussed above, the city demands payment of a recurring annual fee. *See supra* at 3-4. These fees, which are designated by Portland for the use of the rights-of-way, vary dramatically between carriers. *See id.* The record also shows that Portland's Charter gives it the right to demand conduit or fiber in exchange for a franchise. The City

generally exercises this authority without fail, making such donations to the City a condition of obtaining a franchise.[6] The only franchise without such an in-kind requirement is the one the City granted to its own carrier, IRNE. IRNE is not required to build or contribute any in-kind facilities. Like the fees, the record shows that the City demands widely divergent in-kind compensation from the carriers.[7] The City then donates to IRNE the in-kind facilities demanded from franchisee carriers.[8] The City admits that IRNE's prices are substantially reduced because it does not have to recover the costs of the in-kind assets in its prices.[9] IRNE's prices are approximately 50% below what they would be if IRNE were realizing its actual costs.[10]

Under the Ninth Circuit's present ruling, federal courts do not even have jurisdiction to determine whether the fees are unlawful. And yet, Qwest has lost established customers to IRNE, including Portland Public Schools, Port of Portland, Multnomah County, Multnomah Educational School District, and Metro.[11] The record showed that each of these customers identified pricing as a reason for the switch to IRNE. The loss of these customers alone amounts to approximately 11% of Qwest's annual revenue in the government and education markets in the Portland area.[12] The record also shows that TWT has lost business

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[6] *See* 9 QER (Soloos Depo. I) at 30:6-14, Appendix at 2a; 9 ADD (Charter) § 2-105(a)(24), Appendix at 3a; 10 ADD (Charter) § 10-210(d) (emphasis added), Appendix at 4a.

[7] *See* 12 QER (Olson Depo. I, Ex. 55) at 000083, Appendix at 8a.

[8] 13 QER (Jesuale Depo., Ex. 92) at 000085, Appendix at 5a.

[9] 30 QER (Gray Depo. II) at 52:3-23, Appendix at 6a.

[10] *See* 8 QER (Olson Depo. I) at 86:1-13, Appendix at 6a; 35 QER (Fitzsimmons Decl.) ¶¶ 6, 7, 12, 13, not included in Appendix due to being filed under seal; 32 QER (Jesuale email), Appendix at 7a.

[11] *See* 34 QER (Stepan Decl.) ¶¶ 8-10 & Ex. A, not included in Appendix due to being filed under seal.

[12] *See id.*

and been unable to compete against IRNE because of IRNE's artificially low rates.[13] Carriers will continue to lose customers, revenue, and market share if this Court does not grant certiorari and resolve the matter.

C. This Case Satisfies the Concerns Set out in the Solicitor General's Amicus Curiae Brief in the Sprint Telephony Matter.

In the *Sprint Telephony* matter, filed earlier this year, the Solicitor General submitted an amicus brief. *See* Brief for the United States as Amicus Curiae, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626, 08-759, 2009 WL 1497821 (U.S. May 28, 2009). The Solicitor General acknowledged that there was a circuit conflict concerning the interpretation of section 253(a), *id.* at *15 ("The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of First, Second, and Tenth Circuits."), but suggested that review should not be granted because the *Sprint Telephony* case was based on a facial challenge, *id.* at *9. Here, the record below was fully developed in the District Court and shows that Qwest is losing customers, revenue, and a substantial market share as a result of the City of Portland's regulations. *See supra* at 10-12. The evidence also shows that TWT is losing customers and revenue. *See id.* Thus, the record that was purportedly absent in *Sprint Telephony* exists in this case, underscoring the propriety of granting TWT's petition.

Lastly, the FCC's decision in *California Payphone* does not resolve the confusion, as the Solicitor General suspected it might not. *See Level 3 Commc'ns*, 2009 WL 1497821, at *14 ("Portions of the Ninth Circuit's

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[13] *See* 20 QER (Nicholson Decl.) ¶ 6, not included in Appendix due to being filed under seal.

decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail[,]" and if so, the resulting legal standard "would frustrate the policy of open competition that Section 253 was intended to promote."). To be sure, each of the circuits references and relies upon the FCC's decision. Even so, the circuits widely diverge in the interpretation and application of the standard. The First, Second, Eighth, and Tenth Circuits have acknowledged that any regulation that materially inhibits or materially interferes with the provision of services violates section 253(a), as the FCC stated. *See supra* at 7-10. The Ninth Circuit, on the other hand, now requires regulations that literally prohibit the provision of services. *See id.* In other words, the FCC's ruling has not cleared up the circuit split to any degree, again underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Court grant TWT's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

QCC Franchise § 3.1(A)
ORDINANCE NO. 171914

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or $2.63 per linear foot of Grantee's Telecommunications System in the Streets. The total number of linear feet of Grantee's Telecommunications System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 6.1(B).

TWT Franchise § 3.1(A)
ORDINANCE NO. 171566

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or, (b) an amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale or lease of facilities and subject to Subsection 3.1(B), shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection 3.1(A).

IRNE Franchise § 3(A)(1)(b)
ORDINANCE NO. 177348

Section 3. COMPENSATION AND AUDITING.

A. *Amount of compensation.*

1.b. An amount equal to five percent (5%) of IRNE's Gross Revenues. However, revenues derived from the sale, lease or IRU of facilities and subject to Section 3(A)(2) shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection.

QC Temporary Revocable Permit § c.1
SUBSTITUTE
ORDINANCE NO. 175757

c. COMPENSATION AND AUDITING.

1. *Amount of compensation.* As compensation for the benefits and privileges under this Permit and in consideration of permission to use the Streets of the City, Qwest shall pay as a Permit fee to the City, throughout the duration of this Permit, an amount equal to seven percent (7%) of Qwest's Gross Revenues.

David R. Soloos June 17, 2005 Deposition
Excerpts at 30:6-14

Q. Okay. I think I'm stating your answer correctly because I believe earlier you testified that, you know, when it comes to in-kind compensation, the City has not, as far as you're aware, ever negotiated away that as a part of compensation.

A. We've negotiated it. It's changed occasionally from franchise to franchise, but I don't sit here and recall any instance that that provision has been removed.

PORTLAND CITY CHARTER [EXCERPTS]

Portland City Charter § 2-105(a)(24)

SECTION 2-105 CONTINUATION OF SPECIFIC POWERS.

The City of Portland by its Council has power and authority, subject to the provisions, limitations, and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.

(a) Among such specific powers, the City has power and authority:

24. To provide or require conduits under the streets, lanes, alleys and public places of the City or any part or parts thereof for the use of telephone, telegraph, electric light and other wires, or for other purposes, either by constructing said conduits itself or authorizing or requiring their construction by others upon such terms and conditions as the Council may impose, and to regulate and control the use of such conduits, and to prescribe and establish reasonable rentals to be paid by any person or company using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of such rentals, in addition to the ordinary processes, by such summary methods as it may deem proper. If any such grant be made to any person, firm or corporation, such grantee shall not have power to sublet the same or the use of the same to any person, firm or corporation engaged in selling, hiring, leasing or otherwise

receiving any income from the business or purpose for which it desires to use such conduits, without such person, firm or corporation first obtaining, as provided in this Charter, a franchise for such business, purpose or use.

Portland City Charter § 10-210(d)

Section 10-210. CONDITIONS AND RESTRICTIONS.

(d) No franchise shall be granted without fair compensation to the City therefor, either by way of direct payment or by reduction of rates, fares, or charges, and in addition to the other forms of compensation to be therein provided, the grantee may be required to pay annually to the City such part of its gross receipts as may be fixed in the grant of said franchise. This provision shall not exempt the holder of the franchise from any lawful taxation upon its property nor from any license, charge or imposition not levied on account of such use.

Nancy Jesuale Dep. (Ex. 92 at 000085)

4. *Where is the city getting the money to put IRNE in place?*

The city has the franchising authority over the rights-of-way for telecommunications and public utilities. Over the years, we've been requiring any telecommunications carrier who wants to place conduit in our streets for their network to build additional conduit for the City as a condition of receiving a franchise and permit. We had collected these empty conduit runs all over the city, and the Cable and Franchise office was very interested in seeing them put to use. We began designing a fiber plant that would take advantage of those conduit resources and create a wide-area network or a metropolitan area network for use by the city. As we started to do that, we realized we should collaborate with other public sector agencies because in some places we had conduit where they needed it and in other places they had fiber where we needed it.

Another significant financial outcome of this project will be the ability to leverage millions of dollars of network assets regionally, networks that otherwise would develop independently without coordination. The implementation of the fully realized network is estimated to save all local governments in the region millions of dollars in networking cost to the users over leased alternatives. Preliminary analysis indicated that the City of Portland alone can expect to eliminate nearly 95% of its leased data circuits, while increasing bandwidth per site an average of 500%. This can be done in a cost neutral financial package where no new money is necessary.

Mark Gray January 18, 2006
Deposition Excerpt at 52:3-23

Q. Understood. What I was asking you about is the capital costs of in kind contributed assets. IRNE had no cost of acquisition of those assets; correct?
A. Correct.
Q. And it has no liability or expense in its operating budget for those assets; correct?
A. I don't understand your use of the word liability. But there is no reoccurring cost for the use of those assets.
Q. Right. In other words, it's paying nothing for those in kind capital assets?
A. Correct.
Q. And so the pricing in the cost recovery that's associated with the pricing does not take into account the in kind contributed assets?
A. The acquisition of them, correct.
Q. Okay. And it also doesn't take in account the assets that IRNE utilizes from CTIC?
A. It does not take into consideration the acquisition of those assets.

David C. Olson April 5, 2005
Deposition Excerpts at 86:1-13

Q. Okay. Now let me ask you, if you could, turn to page 92 marked at the bottom. Under "Recommended Utilization of Franchise Assets," could you read the first paragraph under that heading, please?
A. "Franchise assets available to the City are extremely valuable. As an example, the City has empty duct available, which requires that fiber be pulled through the duct at a cost of approximately $2 per foot. In comparison, placing duct alone can cost from $35 to $100 per foot."
Q. Okay. Do you have any reason to disagree with that statement?
A. No.

Nancy Jesuale
February 28, 2002 email

Smith, Ralph

From:	Jesuale, Nancy
Sent:	Thursday, February 28, 2002 9:38 AM
To:	Grewe, Tim
Cc:	Feely, Tom (OMF); Smith, Ralph; Ayres, Nancy; Walters, Ben; Norm Peterson (E-mail); Jim Deason (E-mail); Olson, David
Subject:	IRNE Advisory Board Meeting Feb 27

Yesterday we had our first advisory board meeting, which was extremely successful. IRNE Partners in attendance included Portland Community College, Multnomah County, David Douglas School District, Multnomah Educational School District, METRO. We reviewed some "price points" for IRNE services, although I let them know that the rates were still under review.

The result of the meeting will be several IRNE service orders—telephone service for David Douglas, several fiber circuits for Multnomah County, and a fiber build into MESD headquarters. Very very successful meeting.

We will formalize pricing and file with the OPUC within two weeks. Our pricing is 20-40% below Qwest and AT&T and you can expect a hailstorm of backlash when they figure that out. I am thinking about how best to cover for that.

David C. Olson Depo. I. (Ex. 55 at 000083)

CLEC'S

Company	?	Date	Category of Data	Approx Footage (feet)
ELI		7/29/1998	Informally Provided	75,153
Enron	x	9/1/2000	Partial As-Builts	2,500
Firstpoint (Enron)	x	7/29/1998	Informally Provided	126,428
FirstWorld	x		No Data	
GST		7/29/1998	Informally Provided	261,594
Level3			No Data	
MCI		7/29/1998	Informally Provided	24,746
Wcom / MFS		7/29/1998	Informally Provided	12,606
TCG/AT&T LNS	x		No Data	
Metromedia		6/23/2000	Proposed Construction Prints	120,000
McLeodUSA		4/17/2000	Proposed Construction Prints	250,000
Nextlink (XO)		3/1/2000	Proposed Construction Prints	250,000
All Phase		12/1/2000	Proposed Construction Prints	250,000
Sigma Networks			No Data	
Point-To-Point				
AT&T		7/29/1998	Informally Provided	18,769
FTV			No Data	
IXC			No Data	
Pacific Fiber Link (360 networks)		12/1/2000	As Builts	92,603
Pacific Telecom Cable (PTI)		7/29/1998	Informally Provided	2,033
Qwest (pre USWest)		7/29/1998	Informally Provided	16,327
Sprint		7/29/1998	Informally Provided	8,496
WCI			No Data	
Wcom / MFS		7/29/1998	Informally Provided	12,606
Broadwing			No Data	
Williams Comm			No Data	
Adelphia			No Data	
Global Crossing			No Data	
Portland General Broadband			No Data	
Tyco			No Data	
UNI			No Data	

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